

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 DAYNA M. BROOKS,

5 Plaintiff,

6 vs.

7 NANCY A. BERRYHILL, Acting Commissioner  
8 of Social Security,

9 Defendant.

2:17-cv-00631-VCF

**ORDER**

MOTION FOR REVERSAL AND/OR REMAND [ECF  
No. 21], CROSS-MOTION TO AFFIRM [ECF No. 22]

10 This matter involves Plaintiff Dayna Brooks' appeal from the Commissioner's final decision  
11 denying Brooks' social security benefits. Before the Court is Brooks' Motion for Reversal and/or Remand  
12 (ECF No. 21) and the Commissioner's Cross-Motion to Affirm (ECF No. 22). For the reasons stated  
13 below, the Brooks' motion to reverse or remand is granted and the Commissioner's motion to affirm is  
14 denied.

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16 **STANDARD OF REVIEW**

17 The Fifth Amendment prohibits the government from depriving persons of property without due  
18 process of law. U.S. CONST. amend. V. Social security claimants have a constitutionally protected property  
19 interest in social security benefits. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gonzalez*  
20 *v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). Where, as here, the Commissioner of Social Security  
21 renders a final decision denying a claimant's benefits, the Social Security Act authorizes the District Court  
22 to review the Commissioner's decision. *See* 42 U.S.C. § 405(g).

23 The District Court's review is limited. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015)  
24 ("[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for  
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1 that of the agency.” (quoting *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir.  
2 2014))). The Court examines the Commissioner’s decision to determine whether (1) the Commissioner  
3 applied the correct legal standards and (2) the decision is supported by “substantial evidence.” *Batson v.*  
4 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial evidence is defined as  
5 “more than a mere scintilla” of evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Andrews v.*  
6 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). This means such relevant “evidence as a reasonable mind  
7 might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197  
8 (1938); *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 523 (9th Cir. 2014).

9 If the evidence supports more than one interpretation, the Court must uphold the Commissioner’s  
10 interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). This means that the Commissioner’s  
11 decision will be upheld if it has any support in the record. *See, e.g., Bowling v. Shalala*, 36 F.3d 431, 434  
12 (5th Cir. 1988) (stating that the court may not reweigh evidence, try the case *de novo*, or overturn the  
13 Commissioner’s decision if the evidence preponderates against it).

## 14 **DISCUSSION**

15 In this case, the Administrative Law Judge (“ALJ”) followed the five-step sequential evaluation  
16 process in 20 C.F.R. § 404.1520. The ALJ concluded Brooks did not engage in substantial gainful activity  
17 during the relevant timeframe. (ECF No. 14-1 at 17). The ALJ found Brooks suffered from medically  
18 determinable severe impairments consisting of a history of Lyme disease, cardiomyopathy, chronic pain  
19 syndrome, a history of joint pain, degenerative disk disease, mild degenerative changes of the cervical  
20 spine, and adjustment disorder with depressed mood/depression, but the impairments did not meet or equal  
21 any listed impairment under 20 C.F.R. Part 404, Subpart P, Appendix 1. (*Id.* at 18-19). The ALJ  
22 concluded Brooks’ residual functional capacity, in addition to physical limitations, “is limited to  
23 understanding, remembering and carrying out instructions, and exercising judgment, to perform work  
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1 tasks that are commensurate with the functions of the unskilled occupational base.” (*Id.* at 20). A  
2 vocational expert testified that “there are jobs that exist in significant numbers in the national economy  
3 that the claimant can perform.” (*Id.* at 26). The ALJ found that Brooks was not under a disability as  
4 defined in the Social Security Act. (*Id.* at 27).

5 Brooks challenges this finding. Brooks argues the ALJ rejected the findings of Dr. Larson without  
6 a legally sufficient rationale. (ECF No. 21 at 4). The Commissioner argues the ALJ actually accepted  
7 Dr. Larson’s findings and incorporated them into Brooks’ residual functional capacity. (ECF No. 22 at  
8 3).

9 **I. Dr. Larson’s Findings**

10 Dr. Larson performed a consultative psychological examination on Brooks. (ECF No. 14-1 at 24).  
11 Dr. Larson found that Brooks’ “[d]iminshed pace along with multiple physical concerns would still restrict  
12 her capacity to consistently maintain tasks even” at the basic level of simple one- or two-step instructions.  
13 (*Id.* at 821). Dr. Larson opined that Brooks had moderate limitations in her ability to understand,  
14 remember, and carry out simple instructions and to make judgments on simple work-related decisions.  
15 (*Id.* at 824). A moderate limitation was defined as follows: “There is more than a slight limitation in this  
16 area but the individual is still able to function satisfactorily.” (*Id.*). A marked limitation, one step above  
17 moderate, was defined as follows: “There is a serious limitation in this area. There is a substantial loss in  
18 the ability to effectively function.” (*Id.*). Asked in a section of her report, “Are any other capabilities  
19 affected by the impairment?” Dr. Larson responded, “Slow cognitive processing and diminished pace  
20 would impact the claimant’s ability to sustain work functions.” (*Id.* at 825).

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22 **II. ALJ’s Findings**

23 In evaluating Brooks’ residual functional capacity, the ALJ stated, “Giving the claimant the benefit  
24 of the doubt, and based on her...somewhat slow cognitive processing pace, I have limited her to...perform  
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1 work tasks that are commensurate with the functions of the unskilled occupational based.” (ECF No. 14-  
2 1 at 24). The ALJ noted Dr. Larson’s opinion that Brooks had “only moderate impairments in regards to  
3 simple instructions.” (*Id.* at 25). The ALJ afforded Dr. Larson’s opinion “some weight, to the extent it is  
4 consistent with the claimant’s residual functional capacity.” (*Id.*). “While Dr. Larson did note that the  
5 claimant exhibited slow pace and some confusion during the examination (Exhibit 24F), mental status  
6 examination was otherwise, not particularly remarkable. Documented complaints were limited, and the  
7 claimant received no mental health treatment.” (*Id.*). In the hypothetical to the Vocational Expert, the  
8 ALJ limited Brooks to “work tasks that are commensurate with the functions of the unskilled occupational  
9 base” with no further limitations on Brooks’ pace or ability to carry out instructions. (*Id.* at 89).

10 By not providing the vocational expert with any specific limitations on Brooks’ ability to perform  
11 unskilled work, the ALJ essentially concluded that Brooks was not substantially limited in her ability to  
12 consistently carry out simple instructions. “The basic mental demands of competitive,  
13 remunerative, unskilled work include the abilities (on a sustained basis) to: understand, carry out, and  
14 remember simple instructions.” Social Security Program Operations Manual System DI  
15 25020.010(A)(3)(a). “A substantial loss of ability to meet any of the basic mental demands...would  
16 justify a finding of inability to perform other work even for persons with favorable age, education and  
17 work experience.” Social Security Program Operations Manual System DI 25020.010(A)(3)(b).

18 Brooks argues the “ALJ does not cite to any evidentiary basis to support his rejection of Dr.  
19 Larson’s medical opinion with respect to Brooks’ diminished pace to consistently maintain task at the  
20 basis level of simple instructions.” (ECF No. 21 at 7). The Commissioner argues that the “ALJ essentially  
21 included these limitations in his residual functional capacity assessment” by limiting Brooks to unskilled  
22 work. (ECF No. 22 at 4-5).

1 To determine whether the ALJ's conclusion contradicts Dr. Larson's findings, the Court must  
2 determine whether a "moderate" limitation and other conditions constitute a "substantial loss" in Brooks'  
3 ability to carry out simple instructions on a sustained basis. The Court finds a moderate limitation in  
4 Brooks' ability, by itself, would not constitute a substantial loss in her ability to carry out simple  
5 instructions. A moderate limitation was defined in Dr. Larson's report to indicate that Brooks could  
6 "functions satisfactorily." (ECF No. 14-1 at 824). However, in addition to noting this moderate limitation,  
7 Dr. Larson stated, "Slow cognitive processing and diminished pace would impact the claimant's ability to  
8 sustain work functions." (*Id.* at 825, emphasis added). Therefore, Dr. Larson's opinion indicates that  
9 there is a substantial loss in Brook's ability to carry out simple instructions on a sustained basis.

10 The Court finds that the ALJ's decision contradicts Dr. Larson's opinion. However, the ALJ does  
11 not explain this contradiction. The ALJ's decision merely states he afforded Dr. Larson's opinion "some  
12 weight," and notes that Brooks' "[d]ocumented complaints were limited, and the claimant receives no  
13 mental health treatment." (ECF No. 14-1 at 25).

14 "[T]he Commissioner must provide 'clear and convincing' reasons for rejecting the uncontradicted  
15 opinion of an examining physician." *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995), *as*  
16 *amended* (Apr. 9, 1996) (quoting *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). The opinion of  
17 an examining doctor, even if contradicted by another doctor, can only be rejected for specific  
18 and legitimate reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53  
19 F.3d 1035, 1037 (9th Cir. 1995). "Where an ALJ does not explicitly reject a medical opinion or set  
20 forth specific, legitimate reasons for crediting one medical opinion over another, he errs." *Garrison v.*  
21 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

1 Because the ALJ failed to follow the proper steps in evaluating Dr. Larson's opinion, the matter  
2 must be remanded. The ALJ must either (1) give specific and legitimate reasons for discounting the  
3 treating physician's opinion, supported by substantial evidence or (2) present a new hypothetical to a  
4 vocational expert taking the limitations noted by Dr. Larson into account.

5 ACCORDINGLY,

6 IT IS ORDERED that Brooks' Motion for Reversal and/or Remand (ECF No. 21) be GRANTED.

7 IT IS FURTHER ORDERED that the Commissioner's Cross-Motion to Affirm (ECF No. 22) be  
8 DENIED.

9 IT IS FURTHER ORDERED that the matter be remanded for further proceedings consistent with  
10 the Order.

11 DATED this 12th day of January, 2018.

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14 CAM FERENBACH  
15 UNITED STATES MAGISTRATE JUDGE  
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